Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

CARNELL A. SMITH
Petitioner
v.
TONI W. ODUM
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia

PETITION FOR WRIT OF CERTIORARI

CARNELL A. SMITH
2536 Columbia Crossing Court
Decatur GA 30034-1853
Petitioner, Pro Se
(404) 289 9113

April 9, 2002

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QUESTIONS PRESENTED

1. Is every cognizant State Court, when presented with uncontroverted, credible genetic testing evidence of non-paternity, required to render void for want of subject matter jurisdiction, the previous, underlying, judgment of paternity?

2. Upon a finding by the cognizant State Court that a previous judgment of paternity is void, must that Court Order the refund to the newly-proven non-father, of all child support, whether court ordered or voluntarily paid while under mistaken belief of paternity, collection expenses, and court expenses?

LIST OF PARTIES

Petitioner **Carnell A. Smith,** is a resident and citizen of the State of Georgia and of the United States of America.

Respondent Real Party in Interest **Toni W. Odum** was at all pertinent times, a resident and citizen of the State of Georgia and of the United States of America.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2001

CARNELL A. SMITH
Petitioner
and
TONI W. ODUM
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia

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PETITION FOR WRIT OF CERTIORARI

CARNELL A. SMITH
2536 Columbia Crossing Court
Decatur GA 30034-1853
Petitioner, Pro Se
(404) 289 9113

Petitioner respectfully prays that a writ of certiorari issue to review the Decision entered herein by the Supreme Court of the State of Georgia on January 9, 2002.

OPINIONS BELOW

The 1/9/02 Memorandum Decision of the Supreme Court of the State of Georgia appears as Appendix A. The decision of the Georgia Court of Appeals dated 7/10/01 appears as Appendix B. The Decision of the Superior Court of DeKalb County, Georgia in Civil Action No. 98-12744-9 dated 5/14/01 appears as Appendix C.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on January 9, 2002. This petition for certiorari is being filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

None specifically invoked.

STATEMENT OF THE CASE

A large, well defined, class of civil cases exists across the United States in which some Courts routinely persist in failing their fundamental duty to do justice. In these cases, the court rules that a status of paternity exists, and when later confronted with credible, conclusive scientific evidence of non-paternity, by way of the relatively new, reliable "DNA Test", refuses by artifice and avoidance, to reopen the matter, release the erroneously implicated "non-father" from financial liability, and further refuses to reimburse the "non-father" for sometimes huge past child support assessments having no lawful basis.

A civil state court acquires subject matter jurisdiction over the financial duties of a "putative father" only if that man is in fact the biological or adoptive father of the subject child. Releasing such a man from the financial duties of

fatherhood is not discretionary, when, not being an adoptive parent, that man is demonstrated by the clear result of DNA testing not to be the biological father. Such demonstration finally and without recourse constitutes ***ab initio*** lack of the court's subject matter jurisdiction over the subject of the demonstrated non-father's duty of financial support.

Lack of subject matter jurisdiction may be raised at any time, for it goes to the most crucial connection by which a court acquires the right and obligation to exert that court's power over the affected non-father. The subterfuge of refusing to deal with wrongful paternity adjudications by claiming "laches", or excessive passage of time, cannot lawfully be applied to matters later shown to lack ***ab initio*** subject matter jurisdiction:

Nor may the fiction of paternity be maintained in light of wrongful conduct by any party, for subject matter jurisdiction is a fundamental litigative necessity which is neither created nor destroyed by litigative action; rather, it either exists as a factual basis, or it does not.

A court, upon finding that it lacks ***ab initio*** subject matter jurisdiction, has a very high duty to expeditiously declare its lack of such jurisdiction, and to restore the ***status quo ante***, that is, to declare that the erroneously declared father is not, and never was, the actual father, and further, that any child support paid by him under the false impression of his paternity, or by court order, be wholly refunded to him.

Petitioner Carnell A. Smith, representing himself, hereby petitions that a Writ of Certiorari issue to the Georgia Supreme Court regarding the denial by that Court on January 9. 2002 of leave to appeal from the Order of the Honorable Edward A. Wheeler, Senior Judge, Stone Mountain Judicial Circuit , Superior Court, DeKalb County, dated May 14, 2001.

Petitioner respectfully submits that the Superior Court of DeKalb County committed fundamental error at law, in denying to Petitioner a new trial, sought on August

28, 2000 (less than three years from entry of the Superior Court's Consent Legitimation Order dated July 28, 1999, and its March 2, 2000 Visitation and Child Support Order) based upon newly discovered DNA evidence of non-paternity. Further, that each of the involved Georgia Appellate Courts failed to abide by their respective mandatory duty to examine a claimed lack of Subject Matter Jurisdiction, by refusing to grant Petitioner's Applications for Discretionary review.

Petitioner further submits that the Superior Court of DeKalb County committed fundamental error at law, in denying retrial of an order of legitimization originally based upon application and consent of the de-facto non-father before he suspected Plaintiff/Respondent's fraudulent concealment.

The Application to the Court of Appeals urged, and the subsequent State Supreme Court Petition for Certiorari, or alternatively, Application for Discretionary Appeal necessarily re-urged, that lack of de-facto biological paternity deprives the Superior Court ***ab initio*** of subject matter jurisdiction to assess statutory child support from the non-father, or to enter or perpetuate an order of legitimization as to the non-father.

Since lack of subject matter jurisdiction may be raised at any time, it would, if recognized herein, establish precedent broadly applicable in every State, to all defrauded biological non-fathers who are wrongfully refused cessation of child support orders and reimbursement for formal or informal past payments of child support arising from a mistaken belief in their paternity status.

Wrongful perpetuation of Georgia Court Orders assessing child support when the parties and the courts become aware that Jurisdiction for such orders is lacking (because the man so ordered is not the biological father intended by the legislature) rises to constitutional dimensions, and is a crucial matter of nationwide importance, justifying this court's resolution by establishment of a nationwide precedent. No United States

Supreme Court precedent specifically prohibits such a miscarriage of justice.

This Application is the ideal vehicle for reaching a precedent upon which all paternity litigants may rely, and is therefore a matter of national public interest. Public trust and confidence in our court system is shaken so long as the fiction which perpetuates the child support order below, is, along with similar cases, the continuing subject of public outrage and media attention.

Petitioner was led to believe, during pregnancy of his former intimate, Respondent Toni W. Odum, that the child she carried was his. She concealed from him for about a decade, the possibility that he was not the father. Relying thereon, Petitioner paid voluntary child support, and later, in the caption-referenced Paternity matter, paid court ordered support. By counterclaim, Petitioner in good faith secured the child's legitimization and court-ordered custodial and visitation rights.

Only thereafter did Petitioner first become aware of the possibility of his non-paternity. Two DNA tests have each conclusively excluded him as father. The Superior Court on May 14, 2001, denied Petitioner's motion for new trial, based upon his not having earlier availed himself of DNA testing before he had reason to suspect he might not be the father.

STANDARD OF REVIEW

The question of subject matter jurisdiction is not discretionary, but is rather a matter of law which may be raised at any time.

STATEMENT OF FACTS

The parties resided together and had a sexual relationship, which ended when they separated. Shortly after such separation, Respondent/mother informed Petitioner of

her pregnancy, and claimed that he was the father. She deliberately concealed the fact that she contemporaneously had had sexual relations with another man. Thus deceived, Petitioner acted as father by developing a relationship with the child and paying voluntary child support. Eventually, the parties disagreed as to the amount of a mother-demanded increase in child support, and she on January 28, 1999, filed the paternity/support action to which this petition pertains. Petitioner counterclaimed and was granted court-ordered custodial and visitation rights, as well as an Order of Legitimization.

Only thereafter was Petitioner advised by third parties of the possibility that he was not the father. He secured a DNA test, and his non-paternity was confirmed. Mother then demanded a second, independent DNA test, which resulted in the same outcome. She and her counsel stipulated to temporary cessation of child support, but when Petitioner refused to absolve her of reimbursement of the approximately $40,000 he had already paid for a child that was not his, she and her counsel resisted the entire new-trial procedure. The order, to which this Petition pertains, perpetuates the de-facto baseless child support order and legitimization.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Superior Court of DeKalb County committed fundamental error at law, in denying to Applicant, based upon purported lack of "due diligence" a new trial of Child Support and Legitimization based upon newly discovered DNA evidence of non-paternity.

Lack of de-facto biological paternity deprives the Superior Court ***ab initio*** of subject matter jurisdiction to assess statutory child support from the non-father, or to enter or perpetuate an order of legitimization as to the non-father. The Court of Appeals and the State Supreme Court both committed fundamental error at law, in denying the Application for Discretionary Appeal, founded on lack of subject matter jurisdiction, thereby creating a ***sub silentio*** ratification and perpetuation of the trial court's exercise of non-existent subject matter jurisdiction.

1.

Every cognizant State Court, when presented with uncontroverted, credible genetic testing evidence of non-paternity, is required to render void for want of subject matter jurisdiction, the previous, underlying, judgment of paternity.

The Petitioner should have been routinely, and mandatorily, allowed to proceed with his motion for new trial because it attacked a previous final judgment which dealt with paternity and child support, and was based on evidence which was discovered after the Superior Court's Final Order.[1] [2].

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[1] See **Roddenberry v. Roddenberry**, 255 Ga. 715, (1986)

[2] "On an extraordinary motion for a new trial based on newly discovered evidence, it is incumbent on the movant to satisfy the court: (1) that the newly discovered evidence had come to his knowledge since the trial: (2) that want of due diligence was not the reason that the evidence was not

The trial court wrongfully denied the new trial, by finding that Petitioner had failed to exercise due diligence. More specifically, lack of due diligence was attributed by the Trial Court to Petitioner's failure to earlier avail himself of a DNA test on litigative occasions when Petitioner earnestly and in good faith believed himself to be the biological father, in reliance upon Mother's fraudulent withholding from him of information to the contrary.

Petitioner had no reason to believe that he was not the father of the minor child since the Mother repeatedly assured him that he was in fact the biological father. Therefore his duty of "due diligence" did not begin until after he had first been alerted by third parties that he might not be the only male to have been sexually active with the Mother during the period when the child could have been conceived. Petitioner initiated a DNA test promptly after being so alerted.[3]

The trial court extrapolated that the mere fact of separation of the parties gave to Petitioner "... knowledge, at the time he was informed of the pregnancy, that the parties were no longer in a monogamous relationship and therefore he was on notice that he might not be the father". Order,

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acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness." **Human Resources v. Browning**, 210 Ga.App 546, 547 (1993).

[3] "Where a purported father has no reason to suspect the fidelity of the mother, it may not be unreasonable, and in fact may be admirable, for him to acknowledge his paternity without further proof thereof. The law should not punish a purported father for failing to insist on a paternity test when he has no reason to believe that he is not the father. A contrary rule would invite suspicion and distrust, and essentially require all purported fathers, upon divorce or separation to accuse their spouses or partners of infidelity by demanding proof of paternity." ***Smith v. Department of Human Resources***, 226 Ga.App 491, 493 (1997).

Appendix C, p.3 (original numbering), lines 19-22. Nothing in the trial record supports such judicial extrapolation. It is a ***non-sequitur***. This court should take judicial notice that cohabiting couples, married or not, are not necessarily behaving monogamously, and further, that couples who separate are not necessarily thrust into a libertine lifestyle. Such judicial extrapolation should be deemed an abuse of discretion.

The Petitioner was repeatedly assured by the Mother that he was the biological father of the minor child. The Mother voluntarily withheld information that would have caused the Petitioner to doubt the fact that he was the father of the minor child.

The admitted fact that the Mother required assistance of a physician to "determine" (without contemporaneous DNA or any blood testing) that "Mr. Smith was the Father", including the counting of days relative to missed menstruation, is probative of the Mother, Toni Odum knowing from the very beginning of her pregnancy that there were two potential fathers. Her "physician's assistance" in her "determination" would have been unnecessary had Petitioner been the only man with whom she had contemporaneously engaged in intercourse, casting doubt upon her professed certainty as to actual paternity.

Provided with the information that he was not the father of the child, Petitioner would never have been ordered by the Superior Court to pay child support and he would never had agreed to voluntarily pay child support for more than ten (10) years. The evidence of non-paternity would have prevented the Mother from obtaining child support from the Petitioner.

The Mother committed fraud against the Superior Court in several respects:

First, by failing to disclose the possibility of another father, she created an omission from the record of the final hearing.

Second, the Petitioner innocently relied on this omission to his detriment. For more than ten (10) years, based upon false pretenses advocated by the Mother, the Petitioner provided the Mother with over forty thousand dollars ($40,000.00) in child support. [4]

Third, the Petitioner reasonably relied on the Mother's assertion that he was the biological father of the minor child. The Petitioner had no reason to believe that he was not the father of the minor child, and the Mother never informed him of the possibility that he may not be the father of said child. [5]

Throughout the proceedings below, Petitioner persisted in misinterpreting the claimed "advice by Petitioner's Counsel" to "secure a DNA test". Nowhere does the Mother show such purported attorney advice to arise from any factually-based suspicion of non-paternity. The Court may take judicial notice that a proposal to seek DNA evidence is nowadays likely to be a routine procedural suggestion made by every attorney defending his client against child support obligation in any paternity case.

To become aware of the public availability of DNA testing, from a billboard or by suggestion by counsel, is not the onset of a duty of due diligence. It is the realization, for the first time, that facts exist probative of a different man being the father, that should be the trigger for a fresh duty of due diligence.

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[4] *See* ***Gary v. E. Frank Miller Construction Co., Inc.***, 208 Ga.App. 73 (1993).

[5] *See* ***Barret v. Independent Order of Foresters***, 625 F.2d 73 (5th Cir. 1980).

II.

Upon a finding by the cognizant State Court that a previous judgment of paternity is void, that Court must Order the refund to the newly-proven non-father, of all child support, whether court ordered or voluntarily paid while under mistaken belief of paternity, collection expenses, and court expenses.

As a direct result of the fraud, the Plaintiff was forced to relinquish a very substantial amount of money to the Mother, which has inflicted a grave financial harm to him. [6] [7]

The Plaintiff fraudulently obtained over forty thousand dollars ($40,000.00) from the Defendant through deceit. When misrepresentation of a material fact has occurred by one of the parties, then legal fraud has occurred and the party can recover damages based on that fraud. [8]Therefore, the Plaintiff should not be allowed to profit from the fraud she perpetrated against the Court and the Defendant should be allowed to recover from the Plaintiff the damages he incurred due to her fraud. [9]

Lack of ***de-facto*** biological paternity deprives the Superior Court ***ab initio*** of subject matter jurisdiction to assess statutory child support from the non-father, or to enter or perpetuate an order of legitimization as to the non-father.

The trial court found, at Order, Appendix C, p.3, lines 14-18, that:

> "... the Consent Order of Legitimization and Child Custody established paternity and legitimated the child of these parties."

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[6] *See* ***Haynes v. Fincher***, 241 Ga.App. 179 (1999).

[7] "It is a well recognized principle that one may not retain money or goods which have come into (her) hands through mistake and which (she) is not, in good conscience, entitled to retain." ***Department of Medical Assistance v. Presbyterian Home, Inc.*** 200 Ga.App. 885, 887.

[8] *See* ***Morton v. W.T. Tharpe & Co.***, 41 Ga.App 788 (1930).

[9] *See* ***Price v. Mitchell***, 154 Ga.App. 523 (1980).

That cannot be so. Legitimization can only be accomplished by the biological father. Petitioner is absolutely not that person.[10]

There is no doubt that the DeKalb County Court acquired personal jurisdiction over the Mother by her filing of the paternity action, and over Petitioner, by service of process. But personal jurisdiction does not form a foundation for subject matter jurisdiction. Since Petitioner is not a biological parent of the subject child, the Paternity Statutes do not vest the Superior Court with subject matter jurisdiction to order the non-parent Petitioner to pay child support, nor does that court have subject matter jurisdiction to order a "Legitimation" regarding, or initiated erroneously by, a non-parent.

The Superior Court's subject matter jurisdiction to assess child support against an "unwed father" does not exist when such a defendant is not the ***de-facto*** biological father. The Georgia legislature granted power to the Superior Court in paternity cases to determine contested paternity, but did not grant power (subject matter jurisdiction) to make any child-related paternity orders impinging upon a non-parent.

Subject matter jurisdiction cannot be created where it does not exist, nor is it created by agreement or waiver. [11]

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[10] *See* ***Clements v. Phillips***, 235 Ga.App. 588, 510 S.E.2d 311 (Ga.App. 12/03/1998)

[11] "...Must a judgment already rendered be set aside because of an alleged structural error to which the losing party did not properly object? There is no reason in principle why that should always be so. It will sometimes be so - not, however, because the error was structural, *but because, whether structural or not, it deprived the [federal] court of its requisite subject-matter jurisdiction. Such an error may be raised by a party, and indeed must be noticed sua sponte by a court, at all points in the litigation, see, e. g.,* ***American Fire & Casualty Co. v. Finn,*** 341 U.S. 6, 17-18 (1951); ***Mansfield, C. & L. M. R. Co. v. Swan***, 111 U.S. 379, 382 (1884); ***Capron v. Van Noorden***, 2 Cranch 126, 127 (1804)." ***Freytag v. Commissioner,*** 501 U.S. 868 (1991) JUSTICE SCALIA, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER join, concurring in part and concurring in the judgment. (emphasis supplied)

As the U.S. Supreme Court indicated in ***Freytag, id.***, the issue of Subject Matter Jurisdiction not only may be raised at any time, all courts have an affirmative duty to examine the issue when it is raised by a party, or ***sua sponte***. Purported lack of "due diligence" by a litigant does not affect that affirmative duty. The Court of Appeals or State Supreme Court should not be permitted to ***sub silentio*** ratify the trial court's jurisdictionally defective exercise of power to continue application of a mistaken child support order against a non-father.

Indeed, the Court of Appeals and State Supreme Court lack power to so ratify on a theory that Petitioner Carnell Smith "waived" by purported lack of "due diligence" his right to seek the setting aside of the manifestly baseless child support order.[12]

When paternity is declared, legitimization is ordered, or child support is imposed, and the Court becomes aware of dispositive evidence of biological non-paternity, a decision such as that herein, denying retrial on the basis of alleged lack of due diligence, violates the court's duty of jurisdictional self-examination. Just as the execution of a criminal defendant known before the execution to be innocent is an affront to our Constitution, the maintenance of a manifest fiction in order to perpetuate a financial obligation and avoid "delegitimization" of a child violates the

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[12] "Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, i. e., the effect of approving, ex ante, unlawful action by the appellate court itself." ***Freytag v. Commissioner***, 501 U.S. 868 (1991), id. JUSTICE SCALIA, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER join, concurring in part and concurring in the judgment.

Fourteenth Amendment rights not only of the non-father, but also the substantive rights of the child.[13]

Although there was initially an assumption herein by the Superior Court that it had acquired Subject Matter Jurisdiction by virtue of the Petitioner's voluntary agreement to such a declaration of status, once proof of non-paternity is presented, the Superior Court must, however reluctantly, admit that it never actually had subject matter jurisdiction. Granting a new trial is not discretionary in such circumstances, to rectify the mistaken previous judgments and orders; it is necessary in the interests of justice. [14]

O.C.G.A. 19-7-40 clearly provides that the Superior Court and the state courts have jurisdiction of paternity and child support. But once there is proof of non-paternity of the

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[13] "It goes without saying that a child has an interest in not being legitimated by someone who is not his father. *See, e.g.*, ***In re Ashmore***, 163 Ga. App. 194, 195 (1) (293 SE2d 457) (1982) (any interested party may file objection to legitimization petition). The fact that the mother was a participant in a fraudulent scheme to have the child wrongfully legitimated does not lessen this interest. Legitimation is not a game, and the child is not the prize." ***Clements v. Phillips***, *id.* 235 Ga.App. 588, 510 S.E.2d 311 (Ga.App. 12/03/1998)

[14] "....I write separately to point out the absurdity of the present state of the law that requires a putative father to pay child support after he has scientifically proven that he is not the biological father. As I stated in ***Smith v. Department of Human Resources***, 226 Ga. App. 491, 493 (487 SE2d 94) (1997), 'the law should not punish a purported father for failing to insist on a paternity test when he has no reason to believe that he is not the father.' Not only has the putative father been cuckolded, the law adds injury to insult by requiring him to pay child support even after he establishes that he is not the biological father. Once non-paternity is scientifically established, courts cannot ignore such fact by relying on policies developed when no such proof was possible. To create a fiction in this matter does not make the male the biological father of the child; it simply makes him the victim of the law. It also makes an ass of the law....While the courts may preach their false policy, they lose the respect of any citizen with common sense" ***Georgia Department of Human Resources v. Pinter***, 241 Ga.App. 10, 525 S.E.2d 715 (Ga.App. 11/18/1999) BLACKBURN, Presiding Judge, specially Concurring.

non-father, neither the Superior Court nor the state appellate courts remain vested with Subject Matter Jurisdiction regarding him to require, assess, or perpetuate child support.

The United States Supreme Court, earlier in the present 2001-2002 term, denied Certiorari in a Texas-based case wherein review solely invoking the Fourteenth Amendment to the United States Constitution had been denied to a divorced man. He had discovered, via post divorce health-related blood testing, that he was not the biological father of multiple children born during the marriage. While the divorced man did not, as herein, raise lack of subject matter jurisdiction in his Certiorari Petition, he recited a number of valuable cases showing proper post-decree reversal of paternity findings and monetary consequences in States other than Texas. [15]

The Orders herein sought to be vacated are arguably ***void ab initio***. That does not mean that the court does not still have a task to perform in rectifying its previous error. While the Superior Court manifestly lacks Subject Matter Jurisdiction over matters of current or future support regarding Petitioner in this case, it retains personal jurisdiction over the Mother, for having caused Petitioner to be damaged through jurisdictionally defective invocation of the Court's power.

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[15] ***Wise v. Fryar,*** Petition for Writ of Certiorari, U.S. Supreme Court No. 01-562, cert.den., which cited, among others, the following cases:
White v. Armstrong, 1999 WL 33085 (Tenn. Ct.App 1/27/99);
De Filippis v. United States, 567 Fed.2d 341, 343-44 (7th Cir. 1977);
United States v. Swift & Co., 286 U.S. 106, 114-15 , 52 S.Ct 460 (1932;
Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985 (1983);
WY. Dept. of Fam. Serv.,MJJ v.PAG & MJA,934 P.2d 1257 (Wy.1977);
Kohl v. Amundson, 620 NW2d 606 (S.D. 1/3/2001);
AG Edwards & Son v. Norwest Rlty Co..340 NW2d187.189 (S.D.1983);
Love v. Love, 114 Nev. 572, 959 P.2d 523 (Nev. 5/19/98);
Libro v. Walls, 103 Nev. 540, 543, 746 P.2d 632, 634 (Nev. 1987);
Langston v. Riffe v. Langston, Daniel R. v. Tyrone W., 359 Md 396, 754 A.2d 389 (June 28, 2000);
Jenkins v. MAB and JB, 723 So.2d 649 (Ala. 7/17/98)
Dixon v. Punchy, 979 P.2d 520, 526 (Alaska 1999)

CONCLUSION

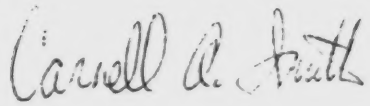
Petitioner, having been subjected to provably void Subject Matter Jurisdiction, has standing to raise a facial challenge against that exercise. Invalidation on constitutional grounds goes directly to the power of a Court to hear, try, and adjudicate a matter wholly based upon an ***ab initio*** lack of the necessary biological relationship by which a de facto father is constitutionally made a party to a paternity action. Petitioner lacks the capacity to "forfeit" the question of subject matter jurisdiction. He can, and has, properly and expeditiously raised the issue for the first time in the trial court, and at every appellate level thereafter. He could have raised it for the first time in seeking Certiorari.

For the foregoing reasons, Petitioner should not have been denied re-opening of the Paternity, Support and Legitimation case.

The United States Supreme Court should choose whichever of the remedies sought herein it deems appropriate, and either grant Certiorari and then upon briefing and argument, reverse the Georgia Supreme Court's denial of Discretionary Appeal, or more directly use its own original discretion to grant a Discretionary Appeal.

Upon recognition of the jurisdictional principles argued herein, this Court may short circuit any extended appellate proceedings and fashion such direct remedies it deems reasonable, including but not limited to directly ordering the Superior Court to reopen proceedings so as to stop the child support order, and order that Petitioner/Applicant be fully compensated for the more than $40,000 fraudulently received by Mother , plus costs.

Respectfully submitted this 9th. day of April, 2002.



Carnell A. Smith
In Propria Persona
2536 Columbia Crossing Court
Decatur GA 30034-1853
(404) 289 9113

Appendix A

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: January 09, 2002

Carnell A. Smith
2536 Columbia Crossing Court
Decatur GA 30034 1853

Case No. S01C1628

CARNELL A. SMITH V. TONI W. ODOM

COURT OF APPEALS CASE NO: A01D0340

The Supreme Court today denied the petition for certiorari in this case.

All the justices concur.

Sherie M. Welch, Clerk

Appendix B

Court of Appeals
of the State of Georgia

ATLANTA, JULY 10, 2001

The Court of Appeals hereby passes the following order:

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

90029

98127449

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta Jul. 10, 2001
I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.
Witness my signature and the seal of said Court hereto affixed the day and year last above written.

Clerk
/S/ Walter Z. Martin, III

Appendix C

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TONI W. ODUM	)	
Plaintiff	)	**CIVIL ACTION**
vs.	)	
CARNELL A. SMITH	)	**FILE NO. 98-12744-9**
Defendant	)	

ORDER

The above-styled case came before the Court for a hearing on April 16, 2001 on Defendant's "extraordinary Motion and Brief for New Trial to Set Aside Child Support and Grant Defendant Relief Based on the Plaintiff's Perpetrating Fraud Upon the Court band Defendant" as amended. Both parties were present and represented by counsel. The Court has considered and reviewed the file, the motion and response, and has heard evidence and argument of counsel.

Procedural History

On December 17, 1998, Plaintiff filed a verified Complaint to Establish Paternity and Set Child Support *pro se*, although she later retained counsel. On January 28, 1999, Defendant, represented by counsel, filed a verified Answer and Counterclaim for Legitimation. The parties presented the Court with a Consent Order of Legitimation and Child Custody signed by both parties and their respective counsel, which the Court signed and filed on July 29, 1999. That same day, the Court signed and filed a second order for temporary child support and visitation. On February 29, 2000, the case came for trial on the issues of child support and visitation; after a lengthy bench trial at which both parties testified, the Court signed and filed an order on March 2, 2000 setting visitation and ordering child

support of $750.00 per month. On March 31, 2000, Defendant, the father, filed "Defendant's Motion to Modify or in the Alternative Motion for reconsideration of the Final Order" asking the Court to allow him more visitation with the child. A hearing on that motion was scheduled but canceled at Defendant's request. On August 28, 2000, Defendant filed the motion now before the Court and informally requested time for the parties to undergo genetic testing to determine the paternity of the child.

Findings of Fact

It is undisputed that the history of the relationship is as follows: the parties, who were dating but not living together, considered themselves to be in a monogamous relationship until Defendant told Plaintiff that he wanted to date other women; after some time had passed and the parties were no longer dating, Plaintiff informed Defendant that she was pregnant with his child. It is undisputed that the child was born in December 1988.

At the hearing, Plaintiff testified that she always considered Defendant to be the father of the child because she had physical indications of possible pregnancy immediately after the parties had stopped seeing each other, before she was intimate with anyone else. Plaintiff testified that she did not know until she received the results of the paternity test in the year 2000 that Defendant was not and could not be the father of this child. Defendant testified that Plaintiff told him she was pregnant and he was the father of the child some time after the parties stopped dating each other, at a time when he considered himself free to date other women and he considered Plaintiff to be free to date other men. Defendant testified that, when he retained an attorney to represent him at the onset of this paternity action, that attorney advised him to take a paternity test and he said no.

The Court finds that the Consent Order of Legitimation and Child Custody established paternity and legitimated the child of these parties. The Court finds that Defendant has abandoned his Motion to Modify regarding

additional visitation, as he is now asking this Court to relieve him of the duties of fatherhood.

The Court finds Defendant had knowledge, at the time he was informed of the pregnancy, that the parties were no longer in a monogamous relationship and therefore Defendant was on notice that he might not be the father. The Court finds that Defendant knew he could request a paternity test before he counterclaimed to legitimate this child, but did not do so. The Court finds that Defendant did not exercise due diligence in ascertaining paternity of the child and that Defendant's want of due diligence was the reason the newly discovered evidence of paternity was not known to him sooner.

Legal Standard

The Georgia Supreme Court held that extraordinary motions for a new trial on the basis of newly available evidence are not favored: The requirements for granting an extraordinary motion for a new trial are clear. On an extraordinary motion for a new trial based on newly discovered evidence, it is incumbent that the movant satisfy the court: (1) that the newly discovered evidence has come to his knowledge since the trial; (2) that want of due diligence was not the reason that the evidence was not acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict; (4) that it is not cumulative onlt; (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness. [Cits. and punctuation omitted] Patterson v. Whitehead, 224 Ga. App. 636, 638(3) (1997), citing Roddenberry v. Roddenberry, 255 Ga. 715, 717 (1986).

Conclusions of Law

Defendant has not proven, by a preponderance of evidence, that Plaintiff perpetrated fraud upon him or this Court. Defendant is not entitled to a grant of a new trial based on newly discovered evidence because he failed to exercise due diligence in acquiring such evidence timely.

Roddenberry, supra. Therefore Defendant's "Extraordinary Motion and Brief for New Trial to Set Aside Child Support and Grant Defendant Relief Based on the Plaintiff Perpetrating Fraud Upon this Court and Defendant":, as amended, is DENIED.

SO ORDERED this 14 day of May, 2001.

/s/ Edward A. Wheeler
Stone Mountain Judicial Circuit
Senior Judge

Cc: Corinne M. Mull, Esq.
Randall M. Kessler, Esq.

(Sealed by deputy clerk 12th day of June, 2001,
signature of clerk illegible)
Filed in DeKalb County Court May 14 2001

Supreme Court, U.S.
FILED
MAY 24 2002
OFFICE OF THE CLERK

No. 01-1520

IN THE

Supreme Court of the United States

CARNELL A. SMITH,

Petitioner,

v.

TONI W. ODUM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

SUPPLEMENTAL BRIEF FOR PETITIONER

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14P9S

QUESTIONS PRESENTED

1. Is every cognizant State Court, when presented with uncontroverted, credible genetic testing evidence of non-paternity, required to render void for want of subject matter jurisdiction, the previous, underlying, judgment of paternity?

2. Upon a finding by the cognizant State Court that a previous judgment of paternity is void, must that Court Order the refund to the newly-proven non-father, of all child support, whether court ordered or voluntarily paid while under mistaken belief of paternity, collection expenses, and court expenses?

LIST OF PARTIES

Petitioner Carnell A. Smith, is a resident and citizen of the State of Georgia and of the United States of America.

Respondent Real Party in Interest Toni W. Odum was at all pertinent times, a resident and citizen of the State of Georgia and of the United States of America.

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STATUTORY BASIS FOR SUPPLEMENTAL BRIEF

This Brief Supplemental to the Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia is filed pursuant to Supreme Court Rule 15.8, to call attention to new legislation not available at the time of the filing of the Petition for Writ of Certiorari.

ARGUMENT

The judgment of the Georgia Supreme Court was entered on January 9, 2002. The petition for writ of certiorari was filed on April 9, 2002. On May 9, 2002, the Governor of Georgia signed into law House Bill 369 as passed House and Senate, which becomes effective on July 1, 2002.

As shown by the dates in the preceding paragraph, this new legislation was not available at the time of the filing of the Petition for Writ of Certiorari to the Supreme Court of the State of Georgia, and therefore this Supplemental Brief drawing attention to the new legislation is filed with the Court.

The new legislation is here reproduced verbatim and in its entirety:

"A BILL TO BE ENTITLED AN ACT

To amend Article 3 of Chapter 7 of Title 19 of the Official Code of Georgia Annotated, relating to determination of paternity, so as to provide for a motion to set aside a determination of paternity based on newly discovered evidence regarding paternity of a child; to provide requirements for filing such a motion; to provide that relief on such motion shall be granted if genetic testing

conclusively shows that the alleged father is not the biological father of the child and certain other conditions are met; to provide that such relief shall not be denied because of the prior occurrence of certain acts unless the alleged father acted with knowledge that he was not the biological father; to provide for additional testing; to provide for costs; to provide for relief; to provide for matters relative to the foregoing; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 3 of Chapter 7 of Title 19 of the Official Code of Georgia Annotated, relating to determination of paternity, is amended by adding after Code Section 19-7-53, relating to confidentiality of hearings, a new Code section to read as follows:

"19-7-54.

(a) In any action in which a male is required to pay child support as the father of a child, a motion to set aside a determination of paternity may be made at any time upon the grounds set forth in this Code section. Any such motion shall be filed in the superior court and shall include:

(1) An affidavit executed by the movant that the newly discovered evidence has come to movant's knowledge since the entry of judgment; and

(2) The results from scientifically credible parentage-determination genetic testing, as authorized under Code Section 19-7-46 and administered within 90 days prior to the filing of such motion, that finds that there is a 0 percent probability that the male ordered to pay such child support is the father of the child for whom support is required.

(b) The court shall grant relief on a motion filed in accordance with subsection (a) of this Code section upon a finding by the court of all of the following:

(1) The genetic test required in paragraph (2) of subsection (a) of this Code section was properly conducted;

(2) The male ordered to pay child support has not adopted the child;

(3) The child was not conceived by artificial insemination while the male ordered to pay child support and the child's mother were in wedlock;

(4) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child; and

(5) The male ordered to pay child support with knowledge that he is not the biological father of the child has not:

(A) Married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support;

(B) Acknowledged his paternity of the child in a sworn statement;

(C) Been named as the child's biological father on the child's birth certificate with his consent;

(D) Been required to support the child because of a written voluntary promise;

(E) Received written notice from the Department of Human Resources, any other state agency, or any court directing him to submit to genetic testing which he disregarded;

(F) Signed a voluntary acknowledgment of paternity as provided in Code Section 19-7-46.1; or

(G) Proclaimed himself to be the child's biological father.

(c) In the event movant fails to make the requisite showing provided in subsection (b) of this Code section, the court may grant the motion or enter an order as to paternity, duty to support, custody, and visitation privileges as otherwise provided by law.

(d) In the event relief is granted pursuant to subsection (b) of this Code section, relief shall be limited to the issues of prospective child support payments, past due child support payments, termination of parental rights, custody, and visitation rights.

(e) The duty to pay child support and other legal obligations for the child shall not be suspended while the motion is pending except for good cause shown; however, the court may order the child support be held in the registry of the court until final determination of paternity has been made.

(f)(1) In any action brought pursuant to this Code section, if the genetic test results submitted in accordance with paragraph (2) of subsection (a) of this Code section are provided solely by the male ordered to pay child support, the court on its own motion may, and on the motion of any party shall, order the child's mother, the child, and the male ordered to pay child support to submit to genetic tests. The court shall provide that such genetic testing be done no more than 30 days after the court issues its order.

(2) If the mother of the child or the male ordered to pay child support willfully fails to submit to genetic testing, or if either such party is the custodian of the child and willfully fails to submit the child for testing, the court shall issue an order determining the relief on the motion against the party so failing to submit to genetic testing. If a party shows good cause for failing to submit to genetic testing, such failure shall not be considered willful.

(3) The party requesting genetic testing shall pay any fees charged for the tests. If the custodian of the child is receiving services from an administrative agency in its role as an agency providing enforcement of child support orders, such agency shall pay the cost of genetic testing

if it requests the test and may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

(g) If relief on a motion filed in accordance with this Code section is not granted, the court shall assess the costs of the action and attorney's fees against the movant.

SECTION 2.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

SECTION 3.

All laws and parts of laws in conflict with this Act are repealed."

This new legislation is directly relevant to the first question presented by Petitioner. It makes non-discretionary the setting aside of a judgment of paternity where a man adjudged to be the father of a child can show, by scientifically credible parentage-determination genetic testing, that he is not in fact the father, and where he has not adopted the child nor prevented the biological father from asserting his parental rights with respect to the child. Relief under the statute is not mandatory where the man is not the biological father because the child was conceived through artificial insemination while the man was married to the mother.

The statute also mandates relief where the man has *not* taken affirmative actions "with knowledge that he is not the biological father of the child"; to wit: married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support; acknowledged his paternity of the

child in a sworn statement; been named as the child's biological father on the child's birth certificate with his consent; been required to support the child because of a written voluntary promise; received written notice from the Department of human Resources, any other state agency, or any court directing him to submit to genetic testing which he disregarded; signed a voluntary acknowledgment of paternity as provided in Code Section 19-7-46.1; or proclaimed himself to be the child's biological father. Relief, in the form of setting aside a judgment of paternity, is available to a man who has taken these actions *without* the "knowledge that he is not the biological father of the child." As set forth in the facts supporting the Petition for Writ of Certiorari, Petitioner was without knowledge that he was not the biological father of the child, because of fraudulent statements and concealments by the Mother of the child.

However, where the father cannot make the showing required for mandatory relief, the Court can order discretionary relief, including none at all. A man would fail to qualify for mandatory relief under the statute because he took certain actions, with knowledge that he is not the biological father of the child, because of the prior law in the State of Georgia, which potentially barred any relief if the man did not act with "due diligence." Therefore, the passing of this new legislation, which addresses the first question presented by Petitioner, nonetheless does not render this issue moot. The question is appropriate and timely for consideration by this Court.

The statute does not address Petitioner's second question, but does not prevent the relief sought therein. Relief for actions filed under this statute are "limited to the issues of *prospective* child support payments, past due child support payments, termination of parental rights, custody, and visitation rights (emphasis added)" if the moving father qualifies for *mandatory* relief. If the father, for whatever

reason, fails to qualify for mandatory relief, the court has discretion to "grant the motion or enter an order as to paternity, duty to support, custody, and visitation privileges as otherwise provided by law." One aspect of Petitioner's second question presented to this Court, and the argument in support thereof as set forth in the Petition for Writ of Certiorari, is whether a court ever had subject matter jurisdiction over a man who is not in fact the biological father of the child, such that any orders or judgments directed to this man concerning paternity were void *ab initio*, and therefore any child support paid by the man should be refunded. The statute does not address at all the situation where a man has been providing support for a child that he believed was his biological child because of misrepresentations or concealment of facts by the Mother of the child. If this Court were to answer Petitioner's second question in the affirmative, it would provide identical relief for men whose paternity was adjudicated and whose obligations were set by a Court, and for men whose paternity was assumed by them and whose obligations were undertaken voluntarily, under the facts known to them at the time.

CONCLUSION

Georgia will have, beginning July 1, 2002, a statute that provides some of the relief sought by the Petitioner. This Court should be aware of the passage and enactment of this new legislation, which directly addresses the subject matter of the questions presented to this Court. The newly enacted law does not moot the questions presented by Petitioner in his Petition for Writ of Certiorari. The Court should answer the questions presented by Petitioner in the affirmative, and grant relief as it deems appropriate.

Respectfully submitted,

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